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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-5261

ALASKA HELICOPTERS, INC., *Petitioner*.

v.

LESTER M. ANDERSON, *Respondent*

GENERAL ELECTIC COMPANY, *Petitioner*

v.

STATE OF ALASKA,
MILLICENT JENNINGS
As Administratrix Of The Estates Of
STEVE GANUELAS AND VICTORIA A. VELASCO,
TED OREIRO, ARTURO QUEBRAL, SIMEON TINAGEN
AND NAKAT PACKING COMPANY, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALASKA

Petitioners, Alaska Helicopters, Inc. and General Electric Company, respectfully request that a writ of certiorari issue to review the two orders of the Alaska Supreme Court dated June 28, 1973 (App. A and C) —final decrees with respect to the question involved.

OPINIONS BELOW

The relevant opinions are all unreported, and are attached as appendices as follows:

APPENDIX A—Supreme Court, Order, dated June 28, 1973, in *Alaska Helicopters, Inc.* v. *Anderson.*

APPENDIX B—Superior Court, Order Granting Reinstatement of Cause, dated August 17, 1972, in *Anderson* v. *Atlantic Richfield Co. and Alaska Helicopters, Inc.*

APPENDIX C—Supreme Court, Order, dated June 28, 1973, in *State of Alaska and General Electric Co.* v. *Jennings.*

APPENDIX D—Superior Court, Order, dated October 6, 1972, in *Jennings* v. *State of Alaska and General Electric Company.*

APPENDIX E—Superior Court, Order Denying Motion to Vacate Order Denying Motion to Set Aside Judgment of Dismissal, dated August 31, 1972, in *Schandelmeier* v. *Winchester Western,* a companion case.

JURISDICTION

These orders of the Alaska Supreme Court were entered June 28, 1973, and this petition has been filed within ninety days of that date.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3), involving a final decree rendered by the highest court of the State of Alaska. The decree is final in accord with *Rosenblatt* v. *American Cyanamid Co.,* 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO* v. *Needham Packing Co.,*

376 U.S. 247, 11 L. Ed. 2d 680, 84 S. Ct. 773 (1964); *Local No. 438, Construction and General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 9 L. Ed. 514, 83 S. Ct. 531 (1963); and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963).

QUESTION PRESENTED

Whether plaintiffs' cases which had been dismissed for a year or more may be reopened by state courts under a rule identical to Federal Rule of Civil Procedure 60(b)(6), solely for the reason that the dismissals took place because of unexcused misconduct and omissions of the plaintiffs' attorney in continued failure to comply with discovery orders, and that failure to reopen would injure the client, or

Whether the holding of *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, reh. den. 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115 (1962), precludes this reopening and binds clients to the results visited upon them for their attorney's misconduct.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

The motions to reopen these cases were granted under the general provision of Alaska Rule of Civil Procedure 60(b)(6), identical to Federal Rule of Civil Procedure 60(b)(6), and attached as Appendix F.

The action of the Alaskan courts was contrary to "our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent." (*Link* v. *Wabash Railroad Company*, 370 U.S. 626, 633, 8 L. Ed. 2d 734, 740 (1962).) The basic precepts of our system constitute due process in

accord with Amendment XIV, Section 1, to the Constitution of the United States.

The result of the action of the Alaskan Court in protecting the client from the effects of his attorney's misconduct and in failing to protect the adverse party from this same conduct constitutes a denial of equal protection in accord with Amendment XIV, Section 1, to the Constitution of the United States.

STATEMENT OF THE CASE

These decisions are two allowing the reinstatement of cases dismissed because of the errors and omissions of the same attorney, Mr. Thomas Curran. Reinstatement was refused upon similar facts in a third, *Schandelmeier* v. *Winchester Western*, and this case is presently under advisement in the Alaska Supreme Court awaiting decision after appeal.

In the first case, Lester Anderson filed suit on October 9, 1969, for personal injuries sustained in a helicopter accident on the North Slope of Alaska. Because of a consistent pattern of thwarting discovery during the course of the lawsuit by failure to answer interrogatories, even in the face of an order compelling answers, and failure to submit to deposition, Alaska Helicopters moved for dismissal of the case on April 14, 1971.

On June 29, 1971, the Superior Court, after hearing, conditionally granted Alaska Helicopter's motion to dismiss and ordered that the action be dismissed unless, among other things, Anderson appeared for his deposition on or before July 9, 1971, and unless before that date Anderson answered interrogatories served on him dated March 5, 1971, and March 24,

1971. Anderson appeared for his deposition on July 8, 1971, but did not file or serve answers to the interrogatories. Accordingly, on July 12, 1971, the Court entered a judgment of dismissal. A copy of this judgment of dismissal was sent to Anderson's attorney by Alaska Helicopters on July 12, 1971, and also sent by the Court on July 13, 1971. On August 9, 1971, after the case had been dismissed, Anderson answered the interrogatories dated March 5, 1971. In November, 1971, Anderson purported to answer the interrogatories propounded to him on March 24, 1971. However, these answers were not signed by Anderson, but were instead signed by his attorney pursuant to an unwitnessed and unnotarized power of attorney which was attached.

On August 26, 1971, Anderson, through his original attorney, filed a motion to set aside the judgment of dismissal and reinstate the case. This motion was denied on September 10, 1971. Anderson's attorney then renoticed the motion on September 19, 1971. This motion was heard on October 15, 1971, and the Court refused to vacate the judgment for a second time. On July 11, 1972, one day short of a year from the date that the case was dismissed, Anderson, through new attorneys, filed still a third motion to reinstate, supported by affidavits and memoranda alleging misconduct of Anderson's original attorney.

The motion was first considered by Judge James M. Fitzgerald who indicated that he would not reinstate the case, but that he referred it to Judge C. J. Occhipinti as the assigned judge for a final decision. Judge Fitzgerald stated:

> "The thing that I can't escape observing at this time, is that I fail to see how under these cir-

> cumstances discovery could be pos—could possibly be effective if interrogatories served long ago as those were not answered time after time when it was called—the attention was called by the court to the fact of the failure to answer. Now, I don't know who the fault is, but it'd be difficult for me to set aside the default under any circumstances and realizing of course that the client may well be deprived as you say on the hearing on the merits of his case, but I don't know what the upshot's going to be because it should go back to Judge Occhipinti. . . ." (Transcript B-572, pg. 2, lines 10-21.)

On August 17, 1972, Judge C. J. Occhipinti reinstated this case solely for the reason of possible attorney misconduct, stating in his order:

> "After a thorough review of the file, it appears that plaintiff may not have been advised of all that transpired in this case or counseled on all that was necessary. To deny his motion would be manifest injustice." (App. B.)

In the second case, Millicent Jennings, secretary to Mr. Curran, filed suit on July 10, 1970, mere days before the statute of limitations ran, as administratrix of the estates of Ganuelas and Velasco, for their deaths caused by a fire at the Nakat Packing Co. cannery at Waterfall, Alaska, on July 13, 1968. Claims for personal injuries to other plaintiffs were joined in the same suit with the wrongful death claims, and Nakat asserted a claim for damage to the cannery. Recovery was sought from General Electric allegedly because the fire was caused by a short-circuit in a General Electric motor, and from the State of Alaska because the State allegedly breached its duty to enforce its fire code.

The first set of interrogatories was served by General Electric on August 18, 1970. A motion to compel answers had to be made on November 6, 1970, and an order compelling answers was entered by the Superior Court on December 8, 1970. In December, 1970, General Electric served additional interrogatories, and filed a motion to produce. On December 29, 1970, General Electric moved for sanctions for plaintiffs' failure to obey the order of December 8, 1970. On January 18, 1971, the order requiring production was entered, and on January 22, 1971, another order compelling answers was entered. General Electric Company made another motion to dismiss on February 3, 1971, because no discovery was yet forthcoming from plaintiffs. At plaintiffs' request, this matter was continued to allow the interrogatories to be answered. The interrogatories were not answered. The State of Alaska had also propounded a set of interrogatories on February 18, 1971, which were unanswered and filed a motion for production on March 19, 1971. The State's motion for production and for an order compelling plaintiffs to answer its interrogatories were heard together with General Electric Company's motion to dismiss on April 23, 1971. At this time, discovery was still not forthcoming. After this hearing, on April 28, 1971, the Court entered an order dismissing all actions on behalf of all plaintiffs, except providing that the actions could be reinstated within sixty days if the discovery work were brought up to date. The work was not done and a confirmation judgment of dismissal with prejudice was entered on August 30, 1971.

Plaintiffs moved to reinstate the case as to plaintiffs, Nakat Packing Company, Millicent Jennings as

Administratrix of the Estate of Victoria A. Velasco, Ted Oreiro, Arturo Quebral and Simeon Tinagen, only, by means of a motion to reinstate filed October 27, 1971, and some interrogatory answers were filed on November 2, 1971. The State of Alaska, joined by General Electric Company, filed a motion to strike the motion to reinstate on the grounds that plaintiffs had not complied with the requirements of Alaska Rule of Civil Procedure 60(b). The motion to strike was granted on January 10, 1972.

On August 28, 1972, plaintiffs, through original and affiliated counsel, again filed a motion for relief from judgment, and requested a reinstatement of the case. This motion was filed one year and four months after the original dismissal, and was granted by order dated October 6, 1972. Judge Edward V. Davis, in reopening the case, specifically found inexcusable neglect on the part of Mr. Curran, but would not impute that neglect to the client. He specifically stated:

> "Gentlemen, my inclination here is to deny this motion out of hand. I would do so without further ado except for the fact that we are not dealing here with Mr. Curran we're dealing with people who may have a perfectly good claim and who probably without fault on their part have not had that claim presented in Court. I'm going to start with the idea that Mr. Curran is not solely at fault in this case. I'm going to start with the idea that his corresponding attorneys have been guilty of substantial neglect here and helped complicate his problem. That doesn't change the fact that Mr. Curran certainly could have and certainly should have done something about this long, long, long before he did. . . . Now what happened between January 10th and August 28th I don't know. Certainly it would appear that something

> should have been done and wasn't done. Mr. Curran, I am not excusing you at all for what you didn't do. I am considering that you have some clients here who are entitled to better representation than they got, either from you or the other attorneys or maybe a combination of both. With that in mind, I'm going to go against my own inclination here and I'm going to grant your motion for relief from judgment. . . ." (Transcript of Hearing, pg. 31 beginning at line 24.)

In the third case, *Schandelmeier* v. *Winchester Western,* discovery was thwarted by continued failure of the Schandelmeiers to present themselves for deposition, contrary to notices sent and specific agreements with Mr. Curran during 1971 and early 1972. A judgment of dismissal was signed on March 29, 1972. Contrary to the two previous cases, Judge James K. Singleton twice refused to vacate the judgment of dismissal by orders dated July 13, 1972, and August 31, 1972. (App. E.)

The Schandelmeier decision (App. E) was appealed from as a final order, and the Alaska Supreme Court discretionarily granted review of the other two orders granting reinstatement. (App. B and D.) After full briefing and consolidated oral argument of all three cases, the Alaska Supreme Court entered orders denying petitioner's request for reversal on the merits in the *Alaska Helicopters* and *General Electric* cases. (App. A and C.) The appeal in *Schandelmeier* remains pending decision in the Alaska Supreme Court.

The decision of all courts was made with full knowledge of the holding and rationale of *Link* v. *Wabash Railroad Company,* 370 U.S. 626, 8 L. Ed. 2d 734, 82 S. Ct. 1386, reh. den. 371 U.S. 873, 9 L.

Ed. 2d 112, 83 S. Ct. 115 (1962), which was called to the attention of all judges and courts at all stages of the proceeding.

REASONS FOR GRANTING THE WRIT

I. These Orders of the Supreme Court of Alaska Are Final Decrees.

The orders of the Alaska Supreme Court are final on the question of the propriety of reopening cases dismissed for attorney misconduct solely because failure to reopen would be detrimental to the client, and constitute precedent which will be applied in future Alaskan cases of this type. This policy determination is anterior to and separable from the merits of the cases themselves. Most important, however, is the fact that these orders present a serious erosion of a national policy—that of preserving the binding effect of attorneys' actions in our federal and state systems of representative litigation. Unless clients are bound by their attorney's actions, the judicial system cannot function. Accordingly, the orders are final under the rationale of *Rosenblatt* v. *American Cyanamid Co.*, 15 L. Ed. 2d 39, 86 S. Ct. 1 (1965); *Local Union No. 721, United Packinghouse, Food and Allied Workers, AFL-CIO* v. *Needham Packing Co.*, 376 U.S. 247, 11 L. Ed. 2d 680, 84 S. Ct. 773 (1964); *Local No. 438, Construction and General Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531 (1963); and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 9 L. Ed. 2d 523, 83 S. Ct. 520 (1963).

II. The Time Is Proper in the Development of the Alaskan Judicial System That This Policy Be Reviewed.

The attitude of the Alaskan judicial system towards blatant rule violations has historically and to the present date been unbelievably lenient, and sanctions almost non-existent. As stated by Judge Singleton when hearing *Schandelmeier:*

> "I, for one, during my trial days have obtained against certain counsel whose names will not be repeated at this time, more than 10 orders from a court to do something and each time there has been a complete default, and each time the default was excused for no reason at all, simply because anything else might interfere with the presentation of the merits of the case, failing to realize that the merits of the case requires some kind of cooperation between both sides so that all the evidence can be developed and presented."

The undersigned has experienced this attitude in his own practice, and several times grave prejudice to his client has resulted.

This policy is ripe for review now because the *Alaska Helicopters* and *General Electric* cases represent the most radical holdings against diligent litigants yet experienced—the reopening of cases dismissed for one year and one year and four months. Additionally, they represent the leaders in what promises to be a parade of these cases. *Schandelmeier* is the third. The undersigned defeated a lower court motion to reopen a fourth, which decision was not appealed. Numerous other cases exist which are dismissed for the same failures, and in which a motion to reopen may well be forthcoming. The extent of the problem in the United States District Court is set forth in the memorandum of Judge Raymond E.

Plummer (App. G) which lists 18 cases involving Mr. Curran alone. The problem is as great in state courts, but a listing has never been compiled.

When the standard of enforcement of court orders and decisions has reached the nadir represented by *Alaska Helicopters* and *General Electric,* it is time that the situation be reviewed. This is especially true since the decisions of the various lower court judges are in conflict, and a number of the decisions appear to be made reluctantly.

III. The Orders of the Alaskan Supreme Court Are Directly Contrary to the Basic Precepts of the Anglo-American Legal System, as These Precepts Are Set Forth in Link v. Wabash Railroad Company, 370 U.S. 626, 8 L. Ed. 2d 734, 82 S.Ct. 1386, reh. den. 371 U.S. 873, 9 L. Ed. 2d 112, 83 S. Ct. 115 (1962).

The *Link* case states that it is basic to our system of representative litigation that each party is deemed bound by the acts of his attorney. The Alaskan decisions are directly contrary because they do not bind the client to the acts of the attorney, but permit the client to disavow the attorney when an unfavorable result is reached. The *General Electric* decision goes further and even permits the attorney to disavow his own acts, because not to do so might injure his client.

IV. Extreme Inherent and Actual Prejudice Has Been Worked on Petitioners and Will be Worked on Numerous Diligent Future Litigants If These Orders Are Not Reversed.

As was recognized in footnote 10 of *Link,* the reopening of these cases is a direct infliction of the results of the sins of plaintiff's attorney upon defendant. In both cases, discovery has become very stale. The independent witnesses to the Anderson accident have left Alaska. The whereabouts of the General

Electric motor is uncertain. Alaska Helicopters probably has lost an indemnity claim against the helicopter manufacturer because the statute of limitations has run.

Most important, however, is the reliance factor built into our judicial system. Reliance is placed on the proposition that judgments are final, subject to the possible relief in Civil Rule 60. This reliance in the finality of judgments of dismissal is no longer available in Alaska, and apparently a defendant is now expected to continue with discovery and trial preparation even after a case has been dismissed. It is obviously unworkable that judgments in Alaska can be reopened solely for attorney misconduct, for our basic system requires that attorneys be able to rely on the authority of the acts of their adversaries.

There are two groups that need protection in situations such as this—the clients and the adverse parties. Protection to the client is available through disbarment or civil malpractice actions, or by simply being more selective in the hiring of an attorney. Protection to the adverse parties is available only through judicial sanctions in each individual case, however. At present in Alaska, as exemplified by these cases, these protections are not available to the adverse parties and all protections go to the client.

A continuation and future strengthening of this imbalance of protections is dreaded, and it is mainly for this reason that a petition for certiorari is sought.

CONCLUSION

The *Link* decision specifically states that clients are bound by the acts of their attorneys, and the Alaskan decisions are contrary. Exactly the same issue has now

been raised in a Rule 60(b)(6) motion, which avenue was specifically left undecided by Link, but which would be presumably foreclosed by *Link's* rationale. Either *Link* means what it says and these orders should be reversed, or Rule 60(b) is available and *Link* must be clarified.

Accordingly, a writ of certiorari should issue to review the orders of the Supreme Court of Alaska, and these orders should be reversed.

Respectfully submitted,

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